

LETTER OPINION
2000-L-96

May 26, 2000

Mr. Andy Mork
Chairman
Morton County Water Resource District
PO Box 176
Mandan, ND 58554-0176

Dear Mr. Mork:

Thank you for your letter requesting my opinion on whether certain brokered certificates of deposit owned by the Morton County Water Resource District (the "District") and issued by two out-of-state providers are lawful investments of the water resource district. You included with your letter a copy of the disclosure statement for the brokered certificates of deposit describing these investment products as well as a confirmation statement describing the particular terms and conditions of the certificates of deposit. From the information you supplied, it appears the District purchased the certificates through Norwest Investment Services, Inc., a broker-dealer.

Water resource districts are political subdivisions of the state and as such are creatures of statute and have only the powers that are provided by law. See N.D. Const. art. VII, § 2.

"A municipal corporation is an agency of the state. It is purely a creature of statute. It takes its powers from the statutes which give it life, and has none which are not either expressly or impliedly conferred thereby or essential to effectuate the purposes of its creation. In defining its powers, the rule of strict construction applies, and any doubt as to their existence or extent must be resolved against the corporation."

Murphy v. City of Bismarck, 109 N.W.2d 635, 642 (N.D. 1961), quoting Lang v. City of Cavalier, 228 N.W. 819, 822 (N.D. 1930) (internal citation omitted).

There are no specific statutory provisions in N.D.C.C. chs. 61-16 and 61-16.1 governing water resource districts which deal with the investment or deposit of funds of a water resource district. This is in contrast to certain other types of political subdivisions that have specific investment or deposit provisions in their governing statutes. See, e.g., N.D.C.C. § 61-37-06(10) (permitting irrigation districts to invest funds or monies of the district in the same manner as permitted

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for the investment of funds belonging to the state or the Bank of North Dakota).

There are, however, general statutory provisions applicable to a broad range of political subdivisions concerning investment and deposit of their funds. For example, N.D.C.C. § 21-06-07 permits certain political subdivisions to invest monies in their general or special funds in "[c]ertificates of deposit fully insured by the federal deposit insurance corporation or by the state." However, this authority is limited to counties, cities, school districts, park districts, and townships and does not include water resource districts.

All political subdivisions of the state are permitted to invest their funds and monies in notes or bonds secured by mortgages insured by the federal housing administrator, debentures issued by the federal housing administrator, and securities issued by national mortgage associations. N.D.C.C. § 6-03-48. Political subdivisions are also permitted, and in some cases required, to invest or deposit public funds in certain public depositories. See N.D.C.C. ch. 21-04, "Depositories of Public Funds" (copy enclosed for your information). N.D.C.C. § 21-04-01 defines the term "public corporation" to include virtually any political subdivision of the state. N.D.C.C. § 21-04-01(4). It broadly defines "public funds" to include:

all funds derived from taxation, fees, penalties, sale of bonds, or from any other source, which belong to and are the property of a public corporation or of the state, and all sinking funds of such public corporation or of the state, and all funds from whatever source derived and for whatever purpose to be expended of which a public corporation or the state have legal custody.

N.D.C.C. § 21-04-01(5).

N.D.C.C. § 21-04-03 provides that "[p]ublic funds belonging to or in the custody of any public corporation must be deposited in the Bank of North Dakota or in financial institutions which have been duly designated as depositories in the manner prescribed in this chapter." Financial institutions include "state and national banks insured by the federal deposit insurance corporation, state chartered or federally chartered savings and loans insured by the federal savings and loan insurance corporation, and state chartered or federally chartered credit unions insured by the national credit union administration." N.D.C.C. § 21-04-01(3).

According to the information you provided, although the District's CD's were purchased through a local representative of a broker dealer, they

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were issued by two out-of-state banks. The disclosure statement recites:

Each CD constitutes a direct obligation of the Issuer and is not, either directly or indirectly, an obligation of the Firm. You will have the ability to enforce your rights in a CD against the Issuer. No deposit relationship shall be deemed to exist prior to the receipt and acceptance of your funds by the Issuer.

See Disclosure Statement at p. 2. However, under state law, in order for a financial institution, such as a bank, to be designated as the depository of public funds it must either be "duly incorporated in this state under and pursuant to the laws governing the incorporation of financial institutions, . . . [or a] financial institution situated and doing business within this state, . . . [or] the Bank of North Dakota" N.D.C.C. § 21-04-05. Neither of the issuing banks is either incorporated in North Dakota or situated within the state.

Because the banks that actually issued the brokered CD's are neither incorporated in the state of North Dakota or situated and doing business within this state and apparently have not been duly designated as depositories for the water resource district, it is my opinion that such brokered certificates of deposit are not legal investments for the water resource district under current law. See State ex rel. Kistler v. City of Hankinson, 205 N.W. 995 (N.D. 1925) (stating a foreign corporation could not act as a depository of city funds under prior version of public depository law).

Since the banks issuing the certificates of deposit are not qualified to be public depositories under N.D.C.C. ch. 21-04 and have not been properly designated as depositories, you should take steps to make deposit arrangements for these public funds with a duly qualified public depository or the Bank of North Dakota. While I understand the water resource district sought to obtain the relatively high rates of return available on brokered CD's and attempted to achieve the safety provided by FDIC insurance on such CD's, water resource districts, under current law, do not have the same investment flexibility as certain other political subdivisions have, and it is important that the water resource district follow the requirements of N.D.C.C. ch. 21-04 or other applicable law.

Sincerely,

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Heidi Heitkamp
Attorney General

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Enclosure